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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-027249 10/14/2015

HON. RANDALL H. WARNER

CLERK OF THE COURT
K. Ballard
Deputy

STATE OF ARIZONA, et al. JEFFREY D CANTRELL

v.

WILLIAM W ARNETT ROBERT L GREER

UNDER ADVISEMENT RULING

I. BACKGROUND.

This is an enforcement action brought by the Arizona Department of Environmental Quality ("ADEQ") against William Arnett, former owner of a leaking underground storage tank ("UST"). Following a trial on liability, the court found Mr. Arnett liable. *See* April 24, 2013 Minute Entry. It found that Mr. Arnett owned the UST, that the UST leaked and that Mr. Arnett violated Arizona environmental requirements with respect to the UST. *Id.* That order was upheld on appeal.

On September 21 and 22, 2015, the court held a bench trial on the appropriate remedy. Based on the evidence presented, the court makes the following findings, conclusions and orders.

II. APPLICABLE LAW.

By statute, the owner of a leaking UST is strictly liable for costs incurred by ADEQ for undertaking corrective action. Those costs include both the cost of remediating the contamination, and the cost of investigation, enforcement and litigation:

> If direct costs are incurred by the director for undertaking corrective action with respect to a release of a regulated substance that is petroleum, the owner and operator are liable to this state for these direct costs. Liability imposed pursuant to this subsection is strict. For the purposes of this subsection, "direct costs" means the cost of the corrective actions, investigations, enforcement and litigation except for those amounts that are not allocated to the owner or operator pursuant to subsection D of this section.

A.R.S. § 49-1017(C). A civil penalty is also authorized for a UST owner who fails to comply with the statutes:

> An owner or operator of an underground storage tank who fails to comply with any of the requirements or standards of this chapter or who fails to comply with a stop use order is subject to a civil penalty of not to exceed ten thousand dollars for each underground storage tank for each day of violation.

A.R.S. § 49-1013(E).

The State seeks to hold Mr. Arnett liable for corrective action costs of $648,000, a penalty in the amount of $1,159,000, and litigation expenses.

III. FINDINGS.

1. In addition to the following findings, the court incorporates the findings in its April 24, 2013 Minute Entry.

2. The UST was installed at 411 North 5th Avenue in Tucson, Arizona ("the Property") in February 1981.

3. Based on the nature of the damage found when the UST was later removed, it is likely that the damage was caused and the leaking began at the time of installation.

4. Mr. Arnett and his wife bought the Property in May 1982.

5. Mr. Arnett first became aware of a leak in October 1988 when the UST failed a tank tightness test.

6. Even after this notice, however, the UST continued to be used and, therefore, continued leaking.

7. Although the tank was being used by Yellow Cab of Tucson, of which Mr. Arnett was president, Mr. Arnett had the ability to stop its use. He did not do so.

8. In 1990, the Tucson Fire Department ordered that the UST be drained and removed. The UST was finally removed from the Property in March 1990.

9. Mr. Arnett sold the Property in 2007.

10. By virtue of an August 1995 Consent Decree, Yellow Cab Company of Tucson agreed and was ordered to remediate the gasoline contamination on the Property.

11. Yellow Cab took some measures, but ultimately did not remediate the contamination.

12. The contamination was not remediated until ADEQ took corrective action during the pendency of this action.

13. There was a substantial amount of underground gasoline contamination on the Property that resulted from the UST leak.

14. In addition to gasoline contamination, there was diesel fuel contamination that originated from a nearby railroad property and migrated to the Property.

15. There also was TCE and PCE contamination that had migrated to the Property from a nearby property that had a dry cleaner on it.

16. The cost of corrective action incurred by ADEQ was $648,000.

17. Of those costs, roughly $28,000 was arguably used to remediate contamination from multiple sources. The court therefore finds that $28,000 to not be compensable.

18. The court finds compensable remediation costs to be $620,000.

19. All of the remediation work done by ADEQ was necessary and appropriate to remediate gasoline contamination from the UST on the Property.

IV. DISCUSSION.

A. Remediation Costs.

1. *Allocation Of Remediation Costs Between Multiple Sources Of Contamination.*

The court has found compensable remediation costs to be $620,000. Relying on A.R.S. § 49-1016(G), Mr. Arnett argues that, although he violated Arizona UST law and is responsible for the leak, he cannot be liable for remediation costs because the State has not allocated those costs among multiple contamination sources. It is undisputed that, at the time of remediation, the Property had underground contamination from three sources: gasoline from the UST, diesel fuel that migrated from the railroad site, and other chemicals that migrated from the dry cleaner property.

A.R.S. § 49-1016(G) says, in pertinent part:

> If there is prima facie evidence that other identified or unidentified persons not at the owner's or operator's facility have contributed to the contamination, the owner or operator shall be responsible to take corrective action only to the extent, by area, of the owner's or operator's release. . . . If who contributed to the contamination cannot be determined by a preponderance of evidence, or if an allocation for some or all of the contamination cannot be established by a preponderance of evidence, the liability that is not established to be the owner's or operator's by a preponderance of the evidence shall not be allocated to the owner or operator.

The purpose of this provision is to deviate from federal law, which imposes joint and several liability for certain environmental clean-up. If multiple persons from different facilities contribute to contamination, the State has the burden of allocating responsibility among them. If the State does not meet that burden as to an owner or operator, he or she is not liable.

The parties dispute the meaning of the term "contamination" in this statute. The court concludes that it refers to the environmental condition for which remediation costs were incurred. "Contamination" can mean contamination from multiple sources if ADEQ undertakes to remediate them all. In such a case, allocation among responsible parties is required. Or, as here, "contamination" can mean pollutants from a single source if that is what ADEQ undertook to remediate.

In this case, the contamination ADEQ remediated was gasoline from the UST. ADEQ spent $620,000 to remediate gasoline, not to remediate diesel, PCE or TCE. And that entire expenditure was appropriately incurred to remediate the gasoline contamination. It may be that incidental remediation of other pollutants occurred, but that does not turn a single-source remediation project into a multi-source remediation project that would require allocation among pollution sources. If ADEQ remediates pollution from a single source and incurs the expense of doing so, it does not have to allocate responsibility simply because there are other pollutants in the area.

2. ***Allocation Of Remediation Costs Between Mr. Arnett And Yellow Cab.***

Mr. Arnett also argues that the State had to allocate responsibility between him as owner and Yellow Cab as operator. A.R.S. § 49-1016(A), provides, however, that if the owner and operator are separate persons, both are responsible for non-compliance:

> Unless specifically indicated otherwise, the responsibilities of this chapter are imposed on the owner and the operator of an underground storage tank. If the owner and operator of an underground storage tank are separate persons, only one person is required to discharge any specific responsibility. Both persons are liable in the event of noncompliance.

Moreover, A.R.S. § 49-1016(G) makes clear that the required allocation is between responsible parties at different facilities, not different persons at the same facility. *See* A.R.S. § 49-1016(G) ("If there is prima facie evidence that other identified or unidentified persons ***not at the owner's or operator's facility*** have contributed to the contamination. . . .) (emphasis added). An allocation between Mr. Arnett and Yellow Cab is not warranted.

3. ***Allocation Of Remediation Costs Between Mr. Arnett And The Prior Owner.***

An allocation is required, however, between Mr. Arnett and the person who owned the UST from its installation in February 1981 until Mr. Arnett bought the Property in May 1982. That person owned the UST for 15 months and then Mr. Arnett owned it for 94 months until its removal in March 1990.

Applying this ratio, Mr. Arnett is responsible for 86.2% of the $620,000 remediation expense, or $534,440.

B. Penalty.

1. *Appropriate Amount.*

A.R.S. § 49-1013(E) authorizes imposition of a civil penalty of up to $10,000 per day if a UST owner fails to comply with Arizona's UST statutes or a stop use order. Much like common law punitive damages, the statute does not require the court to award a particular amount or follow a particular formula in determining the penalty. Rather, it gives the court wide discretion. *See, e.g., Tull v. United States*, 481 U.S. 412, 427, 107 S. Ct. 1831, 1840, 95 L. Ed. 2d 365 (1987) ("In this case, highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties under the Clean Water Act. These are the kinds of calculations traditionally performed by judges."); *United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 526 (4th Cir. 1999) ("the highly discretionary calculations necessary to award civil penalties are reviewed for abuse of discretion").

The statute does not list factors for the court to consider in exercising its discretion but, as the parties point out, other Arizona environmental statutes do. *See* A.R.S. §§ 49-262(H), 49-463(C), 49-464(O). The factors listed in these statutes are largely the same and the court concludes that they are appropriate to consider under A.R.S. § 49-1013. They are as follows.

1. *The seriousness of the violation or violations*. It is difficult to quantify the seriousness of the violation here. On the one hand, the effect on the environment was quite serious: a substantial amount of gasoline escaped into the ground over nearly a decade. On the other hand, there is no evidence that Mr. Arnett knew of the leak until 1988. Of import, however, is that he did know of the leak in 1988 and then took no action to prevent further damage to the environment until he was forced to do so in 1990. He also never remediated the Property, instead relying on the government to do it for him.

2. *The economic benefit if any that results from the violation*. Mr. Arnett did not reap any economic benefit from the leak. He has benefitted, however, from not having to pay to remediate the site until now.

3. *Any history of that violation or similar violations*. Mr. Arnett apparently had some other environmental issues, but the evidence of these was not specific enough to justify considering this factor.

4. *Any good faith efforts to comply with the applicable requirements*. The court finds that Mr. Arnett made some good faith attempt to comply with applicable requirements, but only after ADEQ forced him to do so.

5. *The economic impact of the penalty on the violator*. A penalty will have a significant economic impact on Mr. Arnett. Whether he has the means to pay it cannot be determined from the record.

6. *The duration of the violation*. The most acute violation persisted from October 1988, when Mr. Arnett first learned of the leak, until March 1990 when the UST was finally removed. The justification Mr. Arnett gave at trial for this delay is not credible. Assuming Mr. Arnett was confused in 1988 about whether to deal with ADEQ or the Tucson Fire Department regarding the leak, there should have been no confusion about the need to stop using a leaking underground storage tank.

7. *The extent to which the violation was caused by a third party*. The leak itself was caused by the company that initially installed the UST. But the failure to stop using the tank in 1988, the failure to timely report the leak and the failure to remediate the site were Mr. Arnett's responsibility as owner.

8. *Payment by the violator of penalties previously assessed for the same violation*. No evidence was presented that would permit a finding on this issue.

9. *Any other factor*. None.

The most significant factors are that Mr. Arnett allowed the leak to continue for over a year after its discovery, and that he never remediated the contamination, thus saving the cost of doing so for over two decades. The court will therefore determine the penalty in two parts. The first is a punitive amount for waiting until March 1990 to stop the leak. The second is what Mr. Arnett saved by not having to remediate the property when he should have.

To determine the latter, the court takes $534,440, which is Mr. Arnett's portion of the remediation cost, and reduces it to present value as of 25 years ago, assuming interest at the current legal rate of 4.25%. That amount is $188,798. Subtracting that from $534,440 is $345,642, a rough approximation of the interest Mr. Arnett saved by not remediating the Property 25 years ago.

Regarding the former, there is no formula to decide what amount is appropriate to penalize Mr. Arnett for allowing the leak to continue after its discovery. Much like a punitive damages determination, the court must simply select an appropriate penalty that serves the purposes of specific and general deterrence. Considering all the above factors, the court finds $250,000 to be an appropriate penalty.

The total penalty is therefore $595,642.

2. *Constitutional Challenges.*

Mr. Arnett makes two constitutional arguments against a fine. First, he argues that the fine sought by the State is excessive in violation of the Eighth Amendment as well as Article 2, Section 15 of Arizona's Constitution. The court need not consider whether a $10,000-per-day fine for a 25-year-old violation is excessive, because it has not imposed that fine. The fine imposed in this order is commensurate with the State's remediation costs and is not excessive. *See, e.g., Newell Recycling Co. v. U.S. E.P.A.*, 231 F.3d 204, 210 (5th Cir. 2000) (environmental fine did not violate the Eighth Amendment).

Mr. Arnett also argues that the per-day fine must be constitutionally tolled. The court has not calculated the fine, however, on a per-day basis. To the extent it bases the fine on the time value of money, that is an appropriate measure because it mirrors the benefit Mr. Arnett obtained by not timely remediating the leak.

C. Attorneys' Fees.

The court has already ruled that attorneys' fees would be determined by application after its ruling.

V. ORDERS.

Based on the foregoing,

IT IS ORDERED awarding Plaintiff remediation costs in the amount of $534,440.

IT IS FURTHER ORDERED imposing a penalty on Defendant in the amount of $595,642.

IT IS FURTHER ORDERED that the State lodge a form of judgment and file any application for attorneys' fees and statement of costs within **20 days**.

FILED: Exhibit Worksheet